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Issue Date: 24 April 2003

Case No: 2002-LHC-1436

OWCP No: 6-182658

In the Matter of:

HENRY WHITE,
Claimant,

v.

STEVEDORING SERVICES OF AMERICA,
Employer

and

HOMEPORT INSURANCE COMPANY,
Carrier

DECISION AND ORDER
AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Worker's Compensation Act, as amended, 33 USC § 901, et seq. (hereinafter LHWCA). A hearing was held before me in Charleston, South Carolina, on December 11, 2002, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, I admitted Claimant's Exhibits 1 through 24, Employer's Exhibits 1 through 42, and ALJ Exhibits 1 through 4. The Claimant's post-hearing brief was filed on February 20, 2003; the Employer's post-hearing brief was filed on February 14, 2003; the Director did not file a post-hearing brief. I have reviewed and considered these briefs in making my determination in this matter.

I. Statement of the Case

Testimony of the Claimant

The Claimant was fifty three years old at the time of the hearing. He graduated from high school, and attended one year of regional technical school (Tr. 34). He worked as a longshoreman on the Charleston waterfront from 1979 until the date of his accident in 2000 (Tr. 35). During 1999, the year before his accident, the Claimant worked 273 days on the waterfront, mostly as a hustler driver, but also as a hatch tender, a lasher, a crane operator, a top man, a foot man, and a forklift driver (Tr. 37-38). He was assigned to a gang that worked for Cooper T. Smith (Tr. 38). The Claimant testified that he was injured on three previous occasions, but was not assigned a permanent impairment, nor did these injuries affect his ability to work on the waterfront immediately before the accident in question (Tr. 40).

On the date of the accident, his gang was called out as a lashing gang assigned to SSA (Tr. 39). The men in the Claimant's gang were in the process of lashing containers to the base of the ship, using a "three high rod" and a turnbuckle. According to the Claimant, the three high rod has a tendency to come out from the top. The Claimant was holding the turnbuckle after it had been engaged into the hold. Something rocked the ship, and the three high rod came loose from the top. There was a man standing in front of the Claimant, also holding the turnbuckle, who started backing up to get out of the way. As he did so, he dropped the turnbuckle. The Claimant put his right hand on the deck of the ship to pull himself away from the loose three high rod, and the turnbuckle came down and smashed his hand into the deck of the ship. The three high rod then came down and hit him across the back (Tr. 42). The turnbuckle weighs 60 to 70 pounds; the three high rod, which is about an inch or an inch and a half in diameter and ten feet long, weights 67 to 70 pounds (Tr. 42-43).

The Claimant went to the emergency room, and was instructed to see his primary care physician, Dr. Durst. Dr. Durst sent him to the Carolina Spine Institute for his back, and to Dr. Mulberry for his hand (Tr. 43). At the Carolina Spine Institute, the Claimant was treated first by Dr. Johnson with nerve blocks, and then by Dr. Netherton, again with a block. Dr. Netherton considered the possibility of surgery, but decided that a new procedure, which has worked in other cases, would be better (Tr. 44). This procedure, called an I-deck, involves placing a needle into the back to seal up the disk. However, the procedure did not work, because the Claimant's disk was too damaged.

The Claimant wears a back brace, as prescribed by Dr. Netherton. He has constant pain in his back (Tr. 45-46). He feels that his condition has gotten worse since the accident (Tr. 47). He spends most of his day and night in a recliner, and takes muscle relaxers and prescription drugs for pain (Tr. 47-48). He also spends time soaking in a tub. His doctor prescribed water therapy, which he underwent until it was terminated. His doctor then gave him a prescription for a hot tub, which was denied by the Employer (Tr. 50-51).

The Claimant has not returned to work since his accident. After his compensation was terminated, he applied for a disability pension (Tr. 56). As he has been certified as totally disabled by the Union and management, there is not a job on the waterfront for him. Nor does he think that there is any other job that he could perform with his back condition (Tr. 56-57).

The Claimant's hand is painful and swollen at times, and the Claimant wears a wrap on it (Tr. 58).

The Claimant has returned to Dr. Durst for care, because Dr. Netherton left the Carolina Spine Institute. He had an appointment to see Dr. Feinburg, but it was denied by the Employer (Tr. 59).

Carolina Spine Institute

Dr. Netherton prepared a letter dated November 30, 2001. He described the Claimant's May 27, 1999 accident, and the results of the lumbar MRI, which showed some edema and enhancement in the deep paraspinous musculature on the left side at L4-5 and L5-S1. He had mild diffuse disc bulge at L3-4 and bilateral facet arthrosis, with bilateral neuroforaminal stenosis at L4-5. He also had diffuse disc bilateral facet arthrosis with foraminal compression and exital nerve root compression bilaterally, and enhancing annular tears at both neuroforamen. At the L5-S1 level, he had shallow disc protrusions and some right lateral recess, with some displacement of the right S-1 nerve root.

Dr. Netherton indicated that the Claimant had received several epidural injections, but continued to have pain. In November 6, 2000, a discogram was done, which showed annular tears at the L4-5 and L5-S1 level, with posterior leaks from the annulus exacerbating his pain. The Claimant underwent intradiscal electrothermy. He then went through intense physical therapy, and took a multitude of medications, with minimal decrease in his pain.

Dr. Netherton indicated that the Claimant continued to take prescription medication. Both he and Dr. Johnson felt that the Claimant had no surgical options, or any other conservative therapy options. Dr. Netherton indicated that he should continue with medications, injections from time to time, and a wellness program in physical therapy.

Dr. Netherton did not feel that the Claimant would be able to return to any type of heavy work. However, he could work at a supervisory position, if it involved no heavy lifting, or sitting or standing for any prolonged periods of time. He indicated the following permanent restrictions: lifting no weight greater than thirty pounds from floor to knuckle height, no greater than 25 pounds from knuckle to shoulder height, and no

greater than 15 pounds from shoulder to overhead; no pushing or pulling any greater than fifty pounds; minimal squatting, no more than ten percent of any day; use of proper back mechanics when lifting any weight; no sitting or standing for longer than 45 minutes at a time. He indicated that if and when the Claimant returned to this type of position, he should work four hours a day for three days a week, and slowly work up to eight hours a day for five days a week.

Dr. Netherton rated the Claimant's impairment as 15% total, with 5% being the L4-5 level, 5% being the L5-S1 level, and 5% being the multilevel degenerative facet disease.

In a followup letter dated February 18, 2002, Dr. Netherton indicated that the Claimant should undertake no type of longshore work, or any type of work that would put him in a situation where he would have to lift, grab, push, pull, or more than mildly exert his lumbar spine area.

Dr. Netherton's and Dr. Johnson's treatment notes for the period from June 6, 2000 to May 10, 2002 are also in the record. Dr. Netherton's notes of September 25, 2001 indicate that the Claimant was at maximum medical improvement, and that his medications could be manipulated to some degree to help control his pain. At his November 20, 2001 visit, the Claimant was given a prescription for a fitted lumbar support. In his notes of the Claimant's April 3, 2002 visit, Dr. Netherton indicated that the Claimant was permanently and totally disabled, and would only be able to tolerate a sedentary lifestyle, with no lifting of anything greater than ten pounds.

In his May 10, 2002 notes, Dr. Johnson stated that despite all of his treatment, the Claimant had failed to get much improvement. His functional capacity evaluation, which was done on May 6, was valid, and the Claimant tested at the light to medium physical demand level for an eight hour day. Dr. Johnson noted that the Claimant had significant exacerbation of his symptoms after the test, and was still feeling worse than he did before the test. Dr. Johnson felt that the light medium demand level would be the maximum job that the Claimant would be able to do. However, he felt that it was more likely that the Claimant would be better able for longer periods to tolerate light duty or sedentary work. Dr. Johnson indicated that the Claimant had two-level discogenic pain, and had undergone the IDET procedure, and would quality for a fifteen percent permanent impairment rating. He deferred to Dr. Netherton for work restrictions.

Dr. Netherton reviewed job descriptions for hustler driver, forklift operator, hatch tender/flagman, crew member, flag man, hold man, and footman, indicating that the Claimant was not able to perform the described duties.

On August 16, 2002, Dr. Johnson completed a form provided by the Claimant's

attorney in connection with his Social Security disability claim, indicating that the Claimant's impairments were likely to produce good days and bad days, and that he would be likely to be absent from work as a result of his impairments or treatment for more than four days a month.

Dr. Netherton also testified by deposition on August 27, 2002 (EX 26), and discussed the results of his examinations of the Claimant. He indicated that in his February 18, 2002 letter, when he stated that the Claimant should not undertake any type of longshore work, he was assuming that longshore work was heavy work. He also indicated that the results of the Claimant's EMG testing were negative, but that it is possible to have pain without a positive result on the EMG.

Orthopaedic Specialists of Charleston

Claimant's Exhibit 2 includes records from the Orthopaedic Specialists of Charleston, from June 6, 2000, to (CX 2). DR. l. William Mulbry Jr. first saw the Claimant on June 6, 2000 for evaluation of his right hand injury. The Claimant had some swelling, but excellent range of motion in his fingers. X-rays showed no clear fractures or dislocations. Dr. Mulbry's impression was contusion versus injury to the collateral ligaments. He gave the Claimant a removable splint. The Claimant continued to have problems with tenderness, but by July 26, 2000, Dr. Mulbry noted that he had essentially full range of motion, and he would release him to almost full duty. At the August 14, 2000 examination, he indicated that the Claimant could be released to full activity.

The Claimant continued to have soreness and discomfort, and Dr. Mulbry sent him for a bone scan. This showed areas of uptake, consistent with his ligamentous injuries. Dr. Mulbry felt that he had some osteophytes along the ulnar side of the metacarpophalangeal joint of his middle finger. There was also some uptake on the radial side of the index finger. Dr. Mulbry indicated that the ligaments appeared to be healing fine, and although they were probably sore, he would not recommend reconstruction. He indicated that he would return the Claimant to full unrestricted activity, although the Claimant had expressed some interest in a permanent limitation.

The Claimant continued to have pain in his hand, and discussed the option of reconstruction with Dr. Mulbry. The Claimant opted not to proceed with surgery, which Dr. Mulbry thought was reasonable. In his April 16, 2001 notes, Dr. Mulbry indicated that the Claimant had reached maximum medical improvement, and had sustained a permanent partial impairment of 6% to his index finger, 10% to his middle finger, and 4% to his ring finger, for a total of 3% of his right hand. He confirmed this in a letter to the carrier of the same date.

Dr. Mulbry indicated on June 6, 2000 that the Claimant should wear a splint or cast, and that he had a one pound weight limit, with limited repetitive use. By October 29, 2001, he felt that he would not restrict the Claimant's activities.

Charleston Spine and Physical Medicine

Dr. Gregory M. Jones examined the Claimant on November 27, 2001 (CX 4). He discussed the Claimant's injury and course of treatment. He also examined the Claimant, and reviewed his MRI and discography. His impression was persisting partially discogenic low back pain without sciatica, with no evidence of lumbar radiculopathy clinically; multilevel degenerative disc disease with L3-4, L4-5, and L5-S1 lumbar facet arthropathy and disc bulging, the likely source for multifactorial low back and buttock pain with sacroilitis/hip bursitis concomitant. He felt that the Claimant would benefit from a functional capacity evaluation to determine appropriate restrictions. The fact that the Claimant's treatment was not successful raised questions about the diagnosis of a discogenic source for the Claimant's recalcitrant pain. He felt that the lumbar facet pathology could be a source of the pain. He recommended left lumbar facet injection therapies, along with left SI joint/hip bursal/trigger point focal injections.

Dr. Jones felt that it was reasonable to limit the Claimant to no heavy lifting, pushing, or pulling greater than 30-35 pounds on a frequent or repetitive basis. On May 22, 2002, he indicated that he had reviewed the results of the functional capacity evaluation. He stated that the reasonable permanent restrictions for the Claimant were no frequent or repetitive lifting greater than 10-20 pounds, and no intermittent or occasional lifting greater than 20-30 pounds. He also reviewed job descriptions, approving the jobs of auto driver, crane operator and winch operator, flagman or dockman, footman (with no lifting above restrictions), forklift operator, hatch tender/flagman, header, hook-on man, tie-on man, lock man, or dockman (with no lifting above restrictions), hustler driver, van driver, shuttle bus driver, or taxi driver, and water boy.

Trey Ginn

Mr. Ginn is an exercise physiologist and industrial program director at Rehabilitation Centers of Charleston (Tr. 83). He has a Masters degree in exercise physiology and is certified in Ergonomics, and has seventeen years of experience as an exercise physiologist (Tr. 83). Part of his duties include performing functional capacity evaluations, or tests of physical ability to perform tasks (Tr. 84). Mr. Ginn performed a functional capacity evaluation of the Claimant, as prescribed by Dr. Netherton, on April 30, 2002 (Tr. 85). The evaluation took three and a half hours.

According to Mr. Ginn, the equipment used to evaluate the Claimant is part of a

system furnished by Keith Blankenship. It was done with a laptop computer with the Blankenship software, where results were automatically entered into the computer. This equipment was chosen because of its objectivity, as it limits the ability for the tester to have subjective input (Tr. 86).

As a result of the testing, Mr. Ginn determined that the Claimant's physical demand classification was at light to medium, in accordance with the Dictionary of Occupational Titles (Tr. 86-87). The evaluation reflects that the Claimant could return to work full time in light to medium physical type work, with no restrictions on his ability to sit, stand, walk, bend, or squat (Tr. 87). His scores on the test indicated that it was valid (Tr. 87).

Mr. Ginn worked on the Charleston waterfront when he was 17 years old, and has been to the Charleston waterfront to observe longshore jobs performed there (Tr. 88). Based on the job descriptions he was furnished, he felt that the Claimant could return to work on the Charleston waterfront as a hustler driver, a lift driver, a footman, or a flag man (Tr. 89-90).

Mr. Ginn acknowledged that his tests do not reflect how often a person should be able to alternate sitting and standing, and that a person who drives a hustler has to sit, and cannot alternate positions at will while he is driving. (Tr. 93-95).

Functional Capacity Evaluation

The Functional Capacity Evaluation performed by Mr. Ginn on April 30, 2002 appears at Claimant's Exhibit 6. Mr. Ginn concluded that the Claimant's effort was fair, and there were no non-organic signs.

Dr. Robert Edmond Brabham

Dr. Brabham is a licensed psychologist and rehabilitation counselor who retired from the University of South Carolina about five years ago, and has since been in private practice (Tr. 98). As part of his practice, he has full time staff who perform market analyses on a regular basis (Tr. 100). He is familiar with the work done on the Charleston waterfront, as well as the Savannah docks (Tr. 100).

Dr. Brabham was asked by Claimant's counsel to provide an independent evaluation of the Claimant's functional limitations, and their implications from a vocational point of view (Tr. 101-102). He performed a psychological and vocational evaluation, including review of the medical records and testing (Tr. 102). According to Dr. Brabham, the Claimant graduated from a predominantly minority school in the 1970's; his test findings confirmed that the Claimant's academic skills are at the elementary grade level (Tr. 103). His IQ is 72, putting him at the lower ten percent of

the population (Tr. 104).

Dr. Brabham also determined that the Claimant had a pain disorder; his medical records had numerous references to pain medications, and the Claimant was very consistent in his descriptions of pain (Tr. 105). In addition to his diagnosis of borderline intelligence, Dr. Brabham also diagnosed the Claimant with anxiety disorder (Tr. 106).

According to Dr. Brabham, an employer will be leery of hiring a person who says that they are in great pain and must take medication (Tr. 107). In addition, the Claimant's pain is unpredictable, which would affect his attendance (Tr. 107-108). According to Dr. Brabham, a fifty year old individual with back problems, who takes pain medications and draws disability, is not a hot vocational prospect (Tr. 110).

Dr. Brabham was provided with the restrictions from Dr. Netherton, and stated that if all of those restrictions were credible, he did not see how one could get around them vocationally (Tr. 111). He felt very strongly that no one with these restrictions could perform as a hustler driver (Tr. 111-112). He noted that hustlers are unbelievably harsh hard riding vehicles, that must be rammed hard to get them set (Tr. 111-112). He noted that Charleston is a very fast moving port. Based on his conversations with persons at the Union, he stated that once a job was started, it had to be finished; the shifts often run from 8 up to 18 hours (Tr. 113). The drivers work in rotation, and a driver does not have the option to sit out and take a break. The Claimant would not be able to take a break every 45 minutes (Tr. 114).

Given the limitations as set by Dr. Netherton, and the level of the Claimant's pain, and his medication, Dr. Brabham did not believe that the Claimant could perform any of his former jobs on the waterfront (Tr. 114-115).

According to Dr. Brabham, although nobody would admit it, nobody was going to hire a person in his 50's with histories of injuries, claims, and disabilities, and he did not think that the Claimant would be able to secure a job in the local economy (Tr. 115). Even if he were able to secure a job, as soon as he started missing a day or two a week, he would lose it (Tr. 115).

Based on his experience and education, as well as his interview and diagnosis of the Claimant, Dr. Brabham felt that the Claimant is permanently and totally disabled as a result of the injuries he sustained in his May 27, 2000 accident (Tr. 117).

Dr. Brabham's report appears at Claimant's Exhibit 17. Dr. Brabham also reviewed Ms. Favaloro's September 25, 2002 report, and objected to several of her findings. He indicated that her statement that the Claimant demonstrated average aptitude in general intelligence is not correct: there is no evidence to support such a

statement, and in fact the Claimant's full scale IQ is 72, placing him in the low borderline intelligence range, which is not the average range. Dr. Brabham also indicated that Ms. Favaloro was aware that academic scores at the third to sixth grade levels do not permit a person to perform job duties typically associated with a high school graduate. He noted that the Claimant attended a rural, predominantly minority student school more than 35 years ago, when the quality of these educational settings was less than stellar. According to Dr. Brabham, the Claimant is an elementary school functioning individual, not a high school graduate level academician.

Dr. Brabham was disappointed by Ms. Favaloro's comment that the Claimant can add, subtract, and multiply whole numbers, as he felt that she was deliberately trying to suggest academic skills in math that she knew the Claimant did not possess, based on his fifth grade math skills. He stated: "Elementary-level skills are more descriptive of his limited academic skills than are her selected phrases, out of context."

Dr. Brabham indicated that Ms. Favaloro knows that persistent and nearly constant pain is a debilitating condition, and that pain does not lend itself to specific laboratory findings or other mechanical evidence. He noted that the Claimant had been through a multitude of treatment options at a pain clinic with only minimal relief, and that Dr. Netherton concluded that any activity increased his pain. He felt that Dr. Netherton was correct to assume that much of longshore work is heavy.

Dr. Brabham noted that the functional capacity evaluation did not determine that the Claimant could crawl on a frequent basis, as Ms. Favaloro concluded; he was not tested for constant crawling. According to Dr. Brabham, Ms. Favaloro quotes this report selectively, and makes her own generalizations, but does not mention information contrary to her conclusions, such as the fact that the Claimant reported sleeping, lying, or sitting for 22 of 24 hours a day.

Dr. Brabham noted that Ms. Favaloro described a number of medium positions, based on the opinion of one physician, and ignoring medical evidence from physicians familiar with the Claimant's history. According to Dr. Brabham, the Claimant's inability to sit for extended periods of time would eliminate the equipment operator positions, as there is no sit-stand option. He noted that driver positions are defined by the DOT as medium, a fact ignored by Ms. Favaloro, who described them as seated, and permitting breaks at each point. He noted that one might also be expected to assist passengers with their luggage, which is why it is medium work. He indicated that driving any truck is defined as medium also, a fact that she should know.

According to Dr. Brabham, the production and assembler jobs that Ms. Favaloro described do not factor into consideration the Claimant's pain and its vocational consequences. Nor does Ms. Favaloro make any vocational mention of the need to be in attendance on a regular and sustained basis, something the Claimant is not able to

do. She also did not mention the Claimant's need to sit and rest for 16 hours a day, something that no job can accommodate.

Kenneth Riley

Mr. Riley is the president of the International Longshoremen Association, Local 1422, in Charleston (Tr. 153). He is responsible for contract negotiations and administration, and serves as representative to the pension and welfare fund and holiday and vacation fund; he also oversees day to day operations. He has worked on the Charleston waterfront since his graduation from the College of Charleston (Tr. 154). According to Mr. Riley, the work on the waterfront has become much more automated, and the workforce has been reduced significantly (Tr. 155). He indicated that Charleston is the second fastest port in the world, as measured by the number of containers unloaded per hour, next to Hong Kong (Tr. 156). The work at the Charleston port is 95 percent container work (Tr. 157).

Mr. Riley described the duties of the persons in a gang, which consists of a foreman, seven truck drivers, and seven men who work the ship, four of whom work the docks, attaching the locking mechanisms to the containers, and three of whom do the work on the ship (Tr. 157-159). The drivers drive yard hustlers to and from the fields, hauling the containers (Tr. 159). It can take from eight to twenty four hours to unload a ship (Tr. 159). According to Mr. Riley, driving the truck is the number one job that the men try to avoid, because of the repetitiveness and constant motion of the job (Tr. 160). The truck drivers are not allowed to take breaks at their discretion, because they must stay in rotation; a break has to be approved, so that the person on break does not hold up the whole operation (Tr. 160-161).

Mr. Riley was provided with the restrictions by Dr. Netherton, which were concurred in by Dr. Johnson. He stated that a longshoreman with those restrictions could "absolutely not" find gainful work on the Charleston waterfront on a repetitive and regular basis (Tr. 163). He noted that there was a lot of sitting in driving automobiles and trucks, and in driving automobiles, a lot of bending. There was also a log of bending and lifting in working on the ship (Tr. 163-164).

According to Mr. Riley, a longshoreman receives disability retirement when in the opinion of the trustees of the pension and welfare fund, he can no longer perform longshore functions on the waterfront. The decision is made jointly by management and union representatives, relying on opinions by at least two of their three doctors (Tr. 164). The Claimant was granted a disability retirement by the trustees, by a unanimous vote (Tr. 166). According to Mr. Riley, a longshoreman who has been granted disability retirement cannot work on the Charleston waterfront (Tr. 166). To return, the same doctors that concluded he was disabled would have to say that his condition had improved to the extent that he could return to work, and the trustees would have to

review those opinions and approve his return (Tr. 167).

According to Mr. Riley, a person who is restricted from prolonged standing, squatting, or heavy lifting could not work as a hustler driver (Tr. 185).

Daniel S. Hall

Mr. Hall testified by deposition on November 13, 2002 (EX 37). He is a vice president and general manager at Ceres Marine Terminals. Mr. Hall was a member of the board that approved the Claimant's application for disability retirement. He discussed the requirements of the job descriptions approved by Dr. Jones, indicating that the Claimant, with the limitations in his functional capacity evaluation, should be able to perform them. He also indicated that the jobs were readily available on the waterfront.

According to Mr. Hall, Ceres has people working for it with exemptions, which means that they do not have to do certain kinds of work. It is not necessary to be able to do every job on the waterfront to work. He also stated that not all of the jobs required work at a fast pace.

Mr. Hall testified that if the Claimant could lift less than ten pounds, he could work as a water boy or header. However, he acknowledged that he would have to have top seniority to get this position; if his seniority were halfway down the list, he would be less likely to get the job, and in fact he could not say when he would be able to get this job. He acknowledged that the job of water boy was a "cherry picking" job, and few and far between.

Mr. Hall also stated that the Charleston port was the fastest on the east coast, unloading a container every 1.75 minutes. He agreed that the number of men assigned to the crane had decreased by about five in the past 15 years.

Mr. Hall was questioned about the requirements of the flagman job, but did not know the weight of the twist lock or shoe that the flagman was required to lift.

Edward R. Langford

Mr. Langford is a private investigator, retired after fifteen years with the New York City Police Department (Tr. 201-202). With his wife, also a former New York City Police Officer, he owns Tracker Investigations. At the request of the Carrier, his company performed surveillance on the Claimant (Tr. 204). Mr. Langford presented a condensed version of his three to four days of surveillance of the Claimant (Tr. 207). Mr. Langford observed the Claimant for twenty days; he testified that he did not see him flinch or grimace, or do anything that made him think the Claimant was in pain (Tr. 209-

211).

Nancy Favaloro

Ms. Favaloro is a certified rehabilitation counselor, licensed as a rehabilitation and professional counselor in the State of Louisiana (Tr. 216). She has worked as a rehabilitation consultant for approximately 22 years (Tr. 216). At the Employer's request, she interviewed the Claimant on April 5, 2001 (Tr. 219). She also reviewed the Claimant's medical records, including Dr. Netherton's deposition, and the functional capacity evaluation performed in April 2002 (Tr. 220).

Ms. Favaloro has been to the Charleston waterfront on numerous occasions to perform job analysis on longshore positions (Tr. 224). She drove an empty hustler, and rode in a hustler with a container attached (Tr. 225). According to Ms. Favaloro, the hustler has power steering and automatic transmission (Tr. 225). The hustler driver drives the truck back and forth from the ship to the yard. The container is placed on the truck by a crane, and the foot men lock or unlock the shoes (Tr. 226-227). According to Ms. Favaloro, there are usually several trucks lined up to receive a container from the crane, and at that time the driver can get out of the truck until his turn comes to take a container (Tr. 226). Based on her observations, and the number of containers moved, there were usually at least two gangs working (Tr. 229).

Ms. Favaloro prepared a videotape of hustler drivers and foot men as they performed their work discharging containers from a ship (Tr. 231). She also prepared the job descriptions for consideration by Dr. Jones (Tr. 238). Based on her training and experience, and review of the medical records and functional capacity evaluations, Ms. Favaloro felt that the Claimant could return to most of the jobs approved by Dr. Jones (Tr. 240). She indicated that these jobs were in the sedentary to light exertional category (Tr. 248-249). She testified that it did not surprise her that the Claimant was able to work for three years under the restrictions of Dr. McConnell of no prolonged standing, squatting, or heavy lifting, because the jobs were basically sedentary, and did not require him to do the restricted activities (Tr. 251).

Ms. Favaloro testified that, in her opinion, the Claimant could return to work on the Charleston waterfront in the jobs that he previously had the seniority to perform, on a regular basis, and without any loss of wage earning capacity (Tr. 253). Ms. Favaloro also identified jobs that the Claimant could perform in the Charleston area, with wages of $6.50 to $8.00 an hour. In her opinion, however, he would earn higher wages if he returned to longshore work (Tr. 254, 290).

Ms. Favaloro acknowledged that the 45 minute restriction on sitting is different from the Claimant's previous restrictions, and the majority of the Claimant's previous work on the waterfront was driving a hustler, which involves mostly sitting (Tr. 265).

However, the drivers can get out at various points and stand up and stretch (Tr. 266). She did agree that these restrictions prevented him from doing lashing work (Tr. 258). Ms. Favaloro did not feel that the job descriptions considered by Dr. Netherton were accurate for work on the waterfront (Tr. 273). She indicated that driving jobs that involve only driving, as in a hustler, are classified as sedentary (Tr. 276). She also indicated that the Dictionary of Occupational Titles defines longshore work in three ways, as medium, heavy, and very heavy (Tr. 277).

Ms. Favaloro's first Vocational Rehabilitation Report, dated May 31, 2002, is at Employer's Exhibit 28. She identified seven positions in the light to medium physical demand level, within the Claimant's transferrable skills and abilities and anticipated work restrictions. They included a position as assembler, two driver positions, two laundry attendant positions, an inspector position, and an unarmed security officer position. The salary range is $5.50 an hour to $6.50 an hour. Ms. Favaloro noted that she had not yet received a report from Dr. Netherton outlining the Claimant's work restrictions.

Ms. Favaloro's updated report was prepared on September 25, 2002 (EX 28). She noted the restrictions by Dr. Netherton, as well as the results of the functional capacity evaluation. She felt that, given these restrictions, there were many jobs on the Charleston waterfront that the Claimant was capable of performing. Specifically, she indicated that Dr. Jones had approved the jobs of auto driver, crane operator, wench [sic] operator, flagman, dockman, footman, forklift operator, hatch tender, header, hook on man, hustler driver, van driver, shuttle bus driver, and waterboy, all jobs within the work restrictions of Dr. Netherton and the FCE. She indicated that if the Claimant returned to his previous jobs driving hustler trucks and forklifts, or flagging the crane operator, he would experience no wage loss.

According to Ms. Favaloro, there are also jobs outside the waterfront that fit within the Claimant's work restrictions, and match his transferrable skills and abilities. These include the position of driver, parking lot cleaner, production worker, parking lot cashier, and assembler, which pay from $6.50 to $8.00 an hour.

Charleston Pool & Spa

On August 7, 2001, Ms. Angela M. Gilreath wrote to the carrier, indicating that the Claimant's physician had ordered a long term therapeutic program for him, and discussed the benefits the Claimant could hope to receive from regular use of a spa. She indicated that the appropriate spa for the Claimant cost $6295 plus sales tax. The carrier denied the request.

II. Stipulations

The parties have stipulated, and based on the record I find the following:

I. 33 U.S.C. § 901 et seq (hereinafter the Act) is applicable to this claim.

II. The Claimant and Employer were in an employer/employee relationship at the time of the accidents or injuries.

III. The condition of the Claimant's back and right upper extremity is causally related to the accidents or injuries.

IV. The date of the accident or injury was May 27, 2000.

V. The Employer was provided with timely notice of the injury

VI. The date of maximum medical improvement was April 16, 2001 for the right hand, and November 30, 2001 for the back.

VII. The Claimant's filing of the notice of claim was timely.

VIII. The Claimant's average weekly wage was $2,318.36.

III. Issues

The following issues are in dispute:

I. The nature and extent of the Claimant's disability.

II. Whether the Claimant is entitled to temporary total disability payments from November 27, 2001 through April 3, 2002.

III. Whether the Claimant has met his reciprocal duty of returning to suitable employment.

IV. Whether the Claimant is entitled to payment for a home spa for aquatic therapy.

V. Entitlement to attorney's fees and costs.

IV. Discussion

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *Wendler*

v. American National Red Cross, 23 BRBS 408, 412 (1990). It is also well-established that the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *Hite v. Dresser Guiberson Pumping,* 22 BRBS 87, 91 (1989).

A. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). The question of extent of disability is an economic as well as medical concept. *Quick v. Martin,* 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan,* 110 F.2d 840 (1st Cir. 1940). A claimant who shows that he is unable to return to his former employment establishes a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane v. Hayes,* 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991).

"Total disability" is defined as the complete incapacity to earn pre-injury wages in the same work as at the time of injury, or in any other employment. "Usual" employment is defined as the Claimant's regular duties at the time he was injured. Here, if the Claimant establishes that he cannot return to his previous work as a hustler driver, hatch tender, lasher, crane operator, top man, foot man, or forklift driver, he has established a *prima facie* case of total disability.

In the year preceding his injury, the Claimant worked in a variety of positions, but for the most part, he was assigned to work as a hustler driver. The Employer argues that the Claimant is able to return to that position, as well as the other jobs he performed in the past, and thus he has suffered no loss of wage earning capacity. I do not agree.

I had the opportunity to observe the Claimant at the hearing, and I found him to be a very credible witness. His testimony about his near constant and debilitating pain is supported by the records of Dr. Netherton and Dr. Johnson, his treating physicians who observed and treated him over a longitudinal period of time, as well as the Claimant's physical therapy records. As of May 2002, Dr. Johnson indicated that despite all of the treatment the Claimant had undergone, including epidural injections, intradiscal electrothermy, intense physical therapy, and multiple medications, he had not had much improvement. Dr. Brabham, who reviewed the Claimant's records and evaluated the Claimant, concluded that he had a pain disorder with significant

vocational implications, which would preclude him from being able to perform his previous work.[1]

The Board has held that a claimant's credible complaints of pain alone may be sufficient to meet his prima facie burden. *See, Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Richardson v. Safeway Stores,* 14 BRBS 855 (1982); *Miranda v. Excavation Constr.,* 13 BRBS 882 (1981); *Golden v. Eller & Co.,* 8 BRBS 846 (1978), *aff'd* 620 F.2d 71 (5th Cir. 1980). Here, in addition to the Claimant's credible complaints of pain, the Claimant has exertional and postural limitations as a result of his injury. Although there is disagreement as to the exact nature of these limitations, there is no disagreement that they exist.[2]

Based on the above, I find that the Claimant has met his prima facie burden of establishing that he cannot return to his previous employment. I note, however, that even if I were to discount the Claimant's description of pain and his need to take prescription medication, I would still conclude that he is unable to return to his previous employment. In so concluding, I rely most heavily on the opinions of Dr. Netherton, the Claimant's treating physician, who had the opportunity to observe him over a period of time. Dr. Netherton specifically reviewed job descriptions for the positions of hustler driver, forklift operator, hatch tender/flagman, crew member, flag man, hold man, and footman, and concluded that the Claimant could not perform the duties of these positions.[3]

The job that the Claimant performed for the majority of the time was the hustler driver position. Dr. Netherton has stated that the Claimant cannot engage in prolonged standing, squatting, or heavy lifting. Mr. Riley, the president of the ILA Local, testified that someone with those restrictions could not work as a hustler driver; moreover, the drivers cannot take breaks at their discretion, because they could hold up the whole operation in a port that is known as the second fastest in the world.[4]

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[1] I am not persuaded otherwise by the results of the surveillance conducted by Mr. Langford, who did not record the Claimant performing any activities inconsistent with his testimony. The fact that Mr. Langford never saw the Claimant wince or grimace does not mean that the Claimant does not suffer from pain.

[2] The Claimant has submitted reports from Dr. Mulbry, which indicate that the Claimant has no restrictions on the use of his right hand, although Dr. Mulbry felt that he had a 3% permanent impairment in his right hand. As I have found that the Claimant is permanently and totally disabled due to the injury to his back, it is not necessary to address the extent of impairment in his hand.

[3] Thus, I do not find it significant that Dr. Netherton testified that in his February 18, 2002 statement that the Claimant should not undertake any type of longshore work, he assumed that it was heavy work.

[4] I credit Mr. Riley's testimony about the opportunity for hustler drivers to take breaks over that of Ms. Favaloro who, based on her observations on one day at the waterfront, concluded that the drivers could get out of their vehicles while they were waiting in line for a load.

The Employer argues that Dr. Netherton does not have the qualifications or reliable objective foundation to render an opinion that the Claimant is totally disabled. Dr. Netherton's resume reflects that he is an anesthesiologist who is board certified in Pain Medicine, and has practiced in the area of pain management since 1995 (CX 1). As the Claimant's treating physician, he is qualified to offer an opinion on his patient's physical condition. In arguing that Dr. Netherton's opinions are not based on any objective medical evidence, the Employer points to findings of "normal" straight leg raising tests, and the ability to bend and flex with relative ease. Indeed, there are isolated findings of negative straight leg lifting, such as on the Claimant's September 29, 2000 visit, where Dr. Netherton also noted positive straight leg lifting on the right, but negative straight leg lift on the left to 75 degrees, with some tightness in his low back, and with radiating pain to his knee; at 90 degrees, he had fairly significant pain in the low back, across the posterior iliac crest, and into the hip. With very few exceptions, Dr. Netherton's reports reflect that the Claimant demonstrated positive straight leg lifts, pain on flexion and extension at the waist, and radiation of pain to his leg.

Moreover, I note that Dr. Jones, who examined the Claimant at the Employer's request, concluded that he had persisting partially discogenic low back pain without sciatica, with no evidence of lumbar radiculopathy clinically; multilevel degenerative disc disease with L3-4, L4-5, and L5-S1 lumbar facet arthropathy; and disc bulging, which was the likely source for multifactorial low back and buttock pain with sacroilitis/hip bursitis. He agreed that restrictions were appropriate.

I find that Dr. Netherton is qualified to offer an opinion on the Claimant's condition, and that his opinions are supported by his objective clinical findings.

Finally, there is the issue of the Claimant's disability retirement. According to Mr. Riley, a longshoreman who has been granted disability retirement cannot work on the Charleston waterfront unless the same physicians who determined that he was disabled then determine that he has improved to the extent that he can return to work. The trustees must review these opinions and approve the return to work. Here, the Claimant was granted disability retirement by unanimous vote of the trustees. There is nothing in the record to even suggest that the physicians who deemed him unable to perform longshore functions have changed their minds and decided that he can return to work. Nor is there any indication that the trustees have approved such a return to work. As it stands, because of his disability retirement, which was occasioned by the injury at issue here, the Claimant cannot return to work on the waterfront.

Thus, I find that the Claimant has established that he is unable to return to his previous employment, and thus has established his *prima facie* case. As the Claimant cannot return to his previous employment, the burden shifts to the Employer to show the existence of suitable alternate employment for Claimant. Relevant factors in

making such a determination include the Claimant's age, background, employment history and experience, and intellectual and physical capabilities, as well as the reasonable availability of jobs "in the community for which the Claimant is able to compete and which he could realistically and likely secure." *Washington Metropolitan Area Transit Authority,* 36 F.3d 375 (4th Cir. 1994), *quoting Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 201 (4th Cir. 1984), *quoting New Orleans (Gulfwide) Stevedores v. Turner,*661 F.2d 1031, 1042-43 (5th Cir. 1981).

Ms. Favaloro identified several jobs outside the waterfront that she felt matched the Claimant's transferrable skills and abilities. As pointed out by Dr. Brabham, she based this in part on her assumption that the Claimant was of average aptitude in general intelligence, and able to perform duties associated with a high school graduate, when in fact the Claimant is in the low borderline intelligence range, and has academic abilities at the third to sixth grade level. Nor did Ms. Favaloro address the vocational implications of the Claimant's almost constant and debilitating pain, and his need to rest for many hours in a day. I place the most reliance on the opinions by Dr. Brabham, who did take these factors into account, and concluded not only that the Claimant could not perform the jobs identified by Ms. Favaloro, but there was no job that could accommodate his condition.

The Employer argues that the Claimant is not entitled to benefits because he did not make any attempt to secure employment. The Employer is correct that there is no dispute that the Claimant did not try to return to any type of work. However, unless the Employer establishes the existence of suitable alternative employment, this is irrelevant. Based on the above, I find that the Employer has not met its burden of establishing suitable alternative employment, and his failure to look for work is of no moment. Accordingly, I find that the Claimant is totally and permanently disabled.

B. Medical Benefits

The Claimant's former treating physician, Dr. Netherton, twice prescribed a spa or hot tub so that the Claimant could undergo home aquatherapy, an expense that was denied by the Employer. It is the Claimant's burden to establish the necessity of treatment for a work related injury, and that the expense is related to the compensable injury. To be assessed against the employer, the expense must be both reasonable and necessary. The Claimant has established a prima facie case for compensability if a qualified physician indicates that treatment is necessary for a work related condition.

Here, Dr. Netherton, as part of his treatment of the Claimant in connection with his work related injury, prescribed the spa or hot tub for home aquatherapy. Although the Employer denied this request, it now states that it is willing to pay for the reasonable and necessary expense of a hot tub or home spa. However, the Employer balks at the $6300 price tag of the hot tub chosen by the Claimant, claiming that the Act

does not require it to buy the Claimant a "designer" home spa that "may" accommodate several people. The only evidence in the record that describes the spa is the letter and information from Ms. Gilreath of Charleston Spas and Pools for Less, describing the therapeutic benefits of a spa, and indicating that the spa that is appropriate for the Claimant's therapy will cost $6295 plus sales tax. The price includes installation, chemicals for six months, a cover, and instruction on the operation and maintenance of the spa. An attached flyer describes the therapeutic benefits of the spa.

The Employer has offered no evidence that the cost of the hot tub selected by the Claimant is excessive for its intended purpose, or that it is a "designer" hot tub that can be used by parties of people. Nor has the Employer backed up its belated agreement to foot the cost of a hot tub or spa with specifications and prices for spas or hot tubs that will offer the Claimant the needed therapy at a lesser price. Under these circumstances, I find that the Claimant has established that the expense of a home spa or hot tub for therapeutic aquatherapy is both reasonable and necessary, and the Employer must foot the bill for that expense.

ORDER

On the basis of the foregoing, Employer shall:

A. Pay the Claimant permanent total disability compensation benefits from January 23, 2002, based on an average weekly wage of $2,318.36.

B. Pay to the Claimant all medical benefits to which he is entitled under the Act, including the cost of a spa or hot tub appropriate for the home aquatherapy treatment prescribed by Dr. Netherton.

C. Pay to the Claimant's attorney fees and costs to be established by a supplemental order.

D. The District Director shall perform all calculations necessary to effect this Order.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge